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No. 86-_____

Supreme Court, U.S.
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In The Supreme Court of the United States

October Term, 1986

MORRIS THIGPEN, COMMISSIONER, ET AL.,

PETITIONERS

VERSUS

MARION ALBERT PRUETT

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Certiorari shoud be granted where the Court of Appeals erred in holding that the Mississippi Supreme Court did not regularly and strictly impose its procedural bar and therefore Respondent's claim of improper closing argument was not procedurally barred from its consideration by Wainwright v. Sykes and Engle v. Isaac.

2. Certiorari should be granted where the Court of Appeals held that the Respondent's failure to challenge a juror premptorily when it could did not cure the error in the trial court failing to excuse a juror for cause.

TABLE OF CONTENTS

Page:

QUESTIONS PRESENTED---------- i

TABLE OF CONTENTS---------- ii-iii

TABLE OF AUTHORITIES---------- iv-xiii

I. OPINIONS BELOW---------- 1

II. JURISDICTION---------- 3

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED---------- 3

IV. STATEMENT OF THE CASE---------- 4

A. The Substantive Facts----- 4

B. Procedural History-------- 4

V. REASONS FOR GRANTING THE WRIT--- 9

1. Certiorari Should Be Granted Where The Court Of Appeals Erred In Holding That The Mississippi Supreme

TABLE OF CONTENTS - Continued

Page:

Court Did Not Regularly And Strictly Impose Its Procedural Bar And Therefore Respondent's Claim Of Improper Closing Argument Was Not Procedurally Barred From Its Consideration By Wainwright v. Sykes And Engle v. Isaac.---------- 11

2. Certiorari Should Be Granted Where The Court of Appeals Held That The Respondent's Failure To Challenge A Juror Peremptorily When It Could Did Not Cure The Error In The Trial Court Failing To Excuse A Juror For Cause.---------- 53

VI.CONCLUSION---------- 65

CERTIFICATE OF SERVICE---------- 66

TABLE OF AUTHORITIES

Cases:	Page:
Auman v. State, 285 So.2d 146 (Miss. 1973)----------	29,48 49
Barr v. City of Columbia, 378 U.S. 146, 84 S.Ct. 1734, 12 L.Ed.2d 766 (1964)----------	10,14,15 16,31.53
Bass v. Estelle, 696 F.2d 1154, reh'g. denied, 705 F.2d 121 (5th Cir. 1983)----------	22,31,52
Bell v. Watkins, 381 So.2d 118 (Miss. 1980)----------	29,32,36 38
Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982)----------	39
Booker v. Wainwright, 764 F.2d 1371 (11th Cir. 1985)----------	36
Botts v. State, 210 So.2d 777 (Miss. 1968)----------	13
Bouie v. City of Columbia, 379 U.S 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964)----------	16
Boykin v. Alabama, 395 U.S. 238 (1969)----------	42

TABLE OF AUTHORITIES - Continued

Cases:	Page:
Brown v. State, 173 Miss. 543, 158 So.2d 339 (1935), rev'd 297 U.S. 278, 56 461, 80 L.Ed.2d 682 (1936)	18
Brown v. State, 275 So.2d 103 (Miss. 1973)	29
Callahan v. State, 419 So.2d 165 (Miss. 1982)	13
Callahan v. State, 426 So.2d 801 (Miss. 1983)	29,32
Cannaday v. State, 455 So.2d 713 (Miss. 1984)	62
Cory v. Buddendorf, 98 Miss. 98, 54 So. 84 (1911)	13
Culberson v. State, 412 So.2d 1184 (Miss. 1982)	29,32,40
Culberson v. State, 456 So.2d 697 (Miss. 1984)	41,42
Echols v. State, 180 So.2d 630 (Miss. 1965)	43,50

Cases: **Page:**

Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983)---------- 13,29

Edwards v. Thigpen, 595 F.Supp. 1271 (S.D. Miss. 1984)---------- 50

Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982)------ 13,20 26, 52

Evans v. State, 441 So.2d 520 (Miss. 1983), cert den. __U.S.__, 104 S.Ct. 3558, 82 L.Ed.2d 8601 (1984)----- 29

Evans v. Thigpen, 631 F.2d 274 (5th Cir. 1986)---------- 62

Fay v. Noia, 372 U.S. 391, 9 L.Ed.2d 837, 83 S.Ct. 822 (1963)--------- 18

Fondren v. State, 187 So.2d 327 (Miss. 1966)---------- 30,32

Fondren v. State, 199 So.2d 625 (Miss. 1967)---------- 46

TABLE OF AUTHORITIES - Continued

Cases: **Page:**

Goldsby v. Harpole, 249 F.2d 417 (5th Cir. 1957)---------- 18

Goldsby v. State, 266 Miss. 20, 86 So.2d 27 (1956)---------- 18

Gray v. Lucas, 677 F.2d 1087, 1109 (5th Cir. 1982)---------- 14,52

Gray v. State, 472 Miss. 409, 421, n. 1 (Miss. 1985)---------- 57

Harley v. State, 264 So.2d 406 (Miss. 1972)---------- 35,36

Harvey v. State, 168 So.2d 49 (Miss. 1964)---------- 30

Hathorn v. Lovorn, 457 U.S. 255, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982)---------- 11,14,31 53

Henry v. Mississippi, 379 U.S. 433 (1965)---------- 11,31,35

Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981)---------- 20,22,36 52

Cases: **Page:**

Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982)---------- 10,13,20

Holloway v. State, 261 So.2d 799 (Miss. 1972)---------- 13,29,48

In re Broom's Petition, 168 So.2d 44, 48 (1964)---------- 26,30,43 44

In re Jordan, 390 So.2d 584 (Miss. 1980)---------- 29,39

In re Woodruff's Petition, 179 So.2d 268 (Miss. 1965)---------- 30,33

Irving v.State, 194 So.2d 239 (Miss. 1967)---------- 29

Jackson v. State, 337 So.2d 1242 (Miss. 1976)---------- 6

James v. Kentucky, 466 U.S. 341, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984)---------- 16

Johnson v. Thigpen, 623 F.Supp. 1121 (S.D. Miss. 1985)--------- 61

TABLE OF AUTHORITIES - Continued

Cases: **Page:**

Johnson v. Thigpen, 806 F.2d 1243, (5th Cir. 1986)---------- 14,62

Jones v. Thigpen, 795 F.2d 521 (1986)---------- 14

Kennard v. State, 148 So.2d 660 (Miss. 1963)---------- 30,33

King v. Thigpen, 441 So.2d (Miss. 1983)---------- 29,32

Lang v. State, 92 So.2d 670 (1957)---------- 30,33

Leatherwood v. State, 435 So.2d 645 (Miss. 1983)---------- 50

Murphree v. State, 222 So.2d 694 (Miss. 1969)---------- 29,33

Murphy v. Florida, 421 U.S. 794 (1975)---------- 63

NAACP v. Alabama ex rel Flowers, 377 U.S. 288 (1964)---------- 15

NAACP v. Alabama ex rel Patterson, 357 U.S. 449 (1963)---------- 15

TABLE OF AUTHORITIES - Continued

Cases:	Page:
Osborne v. State, 404 So.2d 545 (Miss. 1981)----------	43
Passman v. Blackburn, 652 F.2d 559 (5th Cir. 1981)----------	63
Phillips v. State, 421 So.2d 476 (Miss. 1982)----------	2,42,43
Pruett v. Mississippi, ___U.S.___, 104 S.Ct. 3558, 82 L.Ed.2d 860 (1983)----------	2,6
Pruett v. State, 431 So.2d 1101 (Miss. 1983)----------	2,4,6
Pruett v. Thigpen, 444 So.2d 819 (Miss. 1984)----------	2,7,9,13
Pruitt v. Thigpen, 809 F.2d 1032 (5th Cir. 1986)----------	2
Read v. State, 430 So.2d 832 (Miss. 1983)----------	32
Riley v. State, 183 So.2d 819 (Miss. 1966)----------	30
Riley v. State, 182 So.2d 397 (Miss. 1966)----------	30

TABLE OF AUTHORITIES - Continued

Cases:	Page:
Roe v. Wade, 410 U.S. 113 (1973)---	47
Rogers v. State, 130 So.2d 856 (Miss. 1961)----------	30,32
Shuttlesworth v. City of Birmingham, 376 U.S. 339 (1964)----------	15
Smith v. State, 434 So.2d 212 (Miss. 1983)----------	13,29,32 47
Spears v. State, 278 So.2d 443 (Miss. 1973)----------	29,47
Thigpen v. Wheat, No. 86-1032------	8
Thompson v. State, 188 So.2d 239 (Miss. 1966)----------	29,34
Thornhill v. State, 149 So.2d 27 (Miss. 1963)----------	30,32
United States v. Frady, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982)----------	19,51
Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977)----------	9,13,52

TABLE OF AUTHORITIES - Continued

Cases:	Page:
Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981)----------	39
Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983)----------	13,29
Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986)----------	8,11,32
Wright v. Georgia, 373 U.S. 284 (1963)----------	15
Yates v. State, 189 So.2d 917 (1966)----------	20, 32
Young v. Herring, 777 F.2d 198, 203 (5th Cir. 1985)----------	14,39,52

Constitutional Provisions, Statutes, and Other Authorities:

U.S. Const. Amend. VI----------	3
U.S. Const. Amend. VIII----------	3

TABLE OF AUTHORITIES - Continued

Cases:	Page:
U.S. Const. Amend. XIV----------	3
28 U.S.C. § 1254 (1)----------	3
28 U.S.C. §2254 (a)----------	3
Miss. Code Ann. §99-19-101 to 197 (Supp. 1977)----------	5
Miss. Code Ann §99-39-1 et seq.----	27,31
Miss. Code Ann. §99-35-145---------	27,28 31,44

NO. 86-____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MORRIS THIGPEN, COMMISSIONER, ET AL.,

Petitioners

vs.

MARION ALBERT PRUETT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, State of Mississippi, respectfully prays that the Petition for Writ of certiorari to the United States Court of Appeals for the Fifth Circuit be granted in this case.

I. OPINIONS BELOW

The opinion of the Court of Appeals that forms the basis of this petition is unpublished, and may be found in the Appendix at

A 1- A18 . See: Pruett v. Thigpen, 809 F.2d 1032 (5th Cir. 1986).

Other opinions below pertinent to the determination of this case are:

State Court: Respondent's original conviction and sentence of death were affirmed the Mississippi Supreme Court by written opinion reported as Pruett v. State, 431 So.2d 1101 (Miss. 1983). A200. Pruett's application for leave to file a petition for writ of error coram nobis was denied by written opinion. Pruett v. Thigpen, 444 So.2d 819 (Miss. 1984). A138

United States Supreme Court: This court's denial of respondent's petition for writ of certiorari subsequent to his Direct Appeal is reported as Pruett v. Mississippi, ___ U.S. ___, 104 S.Ct. 3558, 82 L.Ed.2d 860 (1983).

United States District Court: The District Court opinion granting the writ of habeas corpus as to the conviction and sentence not reported, but may be found in

corpus as to the conviction and sentence not reported, but may be found in the appendix at A19-A127. An earlier opinion written in denying the State's Motion for Summary Judgment was likewise unreported, but may be found in the appendix at A128.

JURISDICTION

Petitioner invokes the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Petitioner seeks to invoke the provisions of the Constitution of the United States VI, VIII and XIV. Petitioner also relies on Section 28 U.S.C. § 2254 (a), viz., ". . . a district court shall entertain an application for writ of habeas corpus in behalf of a person in custody

pursuant to a judgment of the State Court only on the ground that he is in custody in violation of the Constitution or laws ... of the United States".

STATEMENT OF THE CASE

A. Substantive Facts

The facts of this case are adequately set forth in the opinion of the Mississippi Supreme Court reported as Pruett v. State, 431 So.2d 1101, 1102-1103 (Miss. 1983).

B. Procedural History

Respondent, Marion Albert Pruett, was indicted for the September 17, 1981 capital murder of Opal H. Lowe a/k/a Peggy Lowe by the Grand Jury of the Circuit Court of Hinds County, Mississippi, First Judicial District, during the November Term 1981. Prior to indictment, a hearing was held before the Honorable William F. Coleman,

Circuit Judge, concerning the appointment of counsel. During said hearing, the respondent indicated that he desired to represent himself. A lengthy hearing was conducted, and the Court found that respondent knowingly and intellegently waived his right to have counsel appointed to represent him. However, as a precautionary measure, the Court, due to respondent's unfamiliarity with State criminal and trial procedure appointed two attorneys as advisory counsel.

Respondent filed a motion for change of venue and the same was granted with no opposition by the state. The case was transferred to the Circuit Court of Lowndes County, Mississippi to be tried during the January 1980 Term. His bifurcated trial was conducted under the procedures set forth in Sections 99-19-101 to 197, Miss. Code Ann. Supp. 1977), and Jackson v. State, 337 So.2d

1242 (Miss. 1976). The jury found respondent guilty of capital murder and then after hearing additional testimony and arguments of counsel returned a sentence of death in the proper form.

On automatic review to the Mississippi Supreme Court the conviction and sentence of death were affirmed on February 23, 1983. Pruett v. State, 431 So.2d 1101 (Miss. 1982). Respondent's petition for rehearing was denied on March 16, 1983.

Respondent then filed a petition for writ of certiorari to the Mississippi Supreme Court with this Court. In due course the petition was denied on March 28, 1983. Pruett v. Mississippi, ___ U.S. ___, 104 S.Ct. 3558, 82 L.Ed.2d 860 (1983).

Upon denial of certiorari, respondent filed an application for leave to file a petition for writ of error coram nobis with

the Mississippi Supreme Court. See Miss. Code Ann. § 99-35-145 (repealed April 17, 1984, Ch. 378, Miss. Gen. Laws 1984). On January 11, 1984, in a written opinion the Mississippi Supreme Court denied the application. The Court noted that the issues which had been litigated on direct appeal were res judicata and those which had not been reaised were forfeited. Pruett v Thigpen, 444 So.2d 819 (Miss. 1984).

Respondent then filed a petition for writ of habeas corpus with the United States District Court for the Nothern District of Mississippi. In response to the state's motion for summary judgment the District Court, on November 21, 1984 issued its memorandum order in this case denying the motion for summary judgment on the basis that Mississippi had no procedural bar in effect at the time that respondent's direct appeal was taken and that the court would consider each claim on the merits. On March 21, 1986 the District Court entered its

memorandum opinion granting habeas relief for a guilt phase error and ordering the State to release respondent form custody or retry him within 120 days.

Both the State and respondent appealed this decision to the United States Court of Appeals for the Fifth Circuit. The Court of appeals affirmed the judgment of the District Court on November 7, 1986. The Fifth Circuit, in its opinion, relied on its ruling in Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986), presently pending on petition for writ of certiorari as Thigpen v. Wheat, No. 86-1032, to justify reaching the merits of the issue and affirming the District Court.

Because of the vitiation of approximately seven decades of Mississippi law by the Fifth Circuit and the District Court, the State brings this instant petition.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit and District Court erred in concluding that the holding by the Mississippi Supreme Court in Pruett v. Thigpen, 444 So.2d 819 (Miss. 1984), denying coram nobis relief on the basis that respondent's claims, which could have been raised on direct appeal but were not were forfeited, was a radical departure from prior precedent. The courts below further erred in not holding the District Court was precluded from reaching the merits of the claim concerning the seating of a juror absent a finding of cause under Wainwright v. Sykes. The State contends that the decision from both a historical and legal standpoint is erroneous in that the Mississippi Supreme Court has traditionally found that the scope of post-conviction review is extremely limited. Concomitantly, the Mississippi Supreme Court opinion was in

specific compliance with Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982), with written findings to the effect that certain claims had been forfeited. Finally, the lower federal court's have placed an unduly restrictive interpretation on the "lack of regular enforcement" rule discussed in Barr v. City of Columbia, 378 U.S. 146, 84, S.Ct. 1734, 12 L.Ed.2d 766 (1964), and by doing so have abolished the State Court's rights to remedy plain error and manifest injustice. For these reasons certiorari should be granted.

In addition when the Court of Appeals addressed the State's contention that the merits were wrongly decided, it erred in holding that respondent's failure to premptorily challenge the juror when they had the opportunity does not bar respondent's claim.

ARGUMENT

1. Certiorari should be granted where the Court of Appeal erred in holding that the Mississippi Supreme Court did not regularly and strictly impose its procedural bar and therefore Respondent's claim of improper closing argument was not procedurally barred from its consideration by Wainwright v. Sykes and Engle v. Isaac.

The Court of Appeals and the District Court relying on Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986); Hathorn v. Lovern, 457 U.S. 255, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982) and Henry v. Mississippi, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965), held that the Mississippi Supreme Court had not clearly announced nor had it regularly-

and systematically applied its procedural rule that barred a person convicted of a crime from raising claims in a postconviction proceeding that he could have raised on direct appeal, but failed to do so. The court below held in Wheat, that the failure of the Mississippi Supreme Court to clearly announce it's procedural rule or to "regularly or strictly" apply it created a situation where the federal courts did not have to honor them. In so holding the Court of Appeals was able to reach the merits of a claim of the improper seating of a juror. The claim concerning the juror could have been raised on direct appeal, however it was not raised until respondent filed his application for leave to file a petition for writ of error coram nobis in the trial court

(Mississippi's post-conviction proceeding at the time.) The Mississippi Supreme Court held the issue barred from its consideration for failure to object at trial and failure to raise the question on direct appeal. Pruett v. Thigpen, 444 So.2d 819, 824 (Miss. 1984). The Mississippi Supreme Court specifically relied on Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983), which relied on Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982); Wainwright v. Sykes, 433 U.S. 72 (1977) and Engle v. Isaac, 456 U.S. 107 (1982), in holding the claims to be barred. The Mississippi Supreme Court also relied on Smith v. State, 434 So.2d 212 (Miss. 1983); Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983); Callahan v. State, 419 So.2d 165 (Miss. 1982); Holloway v. State, 261 So.2d 799 (Miss. 1972); Botts v. State, 210 So.2d 777 (Miss. 1968); and Cory v. Buddendorf, 98 Miss. 98, 54 So. 84 (1911).

In reversing the conviction and sentence the Court of Appeals ignored its own holdings recognizing the procedural bar in Gray v. Lucas, 677 F.2d 1086, 1109 (5th Cir. 1982) (failure to submit a jury instruction on a lesser included offense) and Young v. Herring, 777 F.2d 198, 203 (5th Cir. 1985) (failure to make a contemporaneous objection). The Fifth Circuit has even recognized Mississippi procedural bars in a post-Wheat context. See: Johnson v. Thigpen, 806 F.2d 1243, (5th Cir. 1986); Jones v. Thigpen, 795 F.2d 521, 522 (1986).

The Court of Appeal's application of Hathorn v. Lovern, 457 U.S. 255, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982) and Barr v. City of Columbia, 378 U.S. 146, 84 S.Ct. 1734, 12 L.Ed.2d 766 (1964), through Wheat, when considered in light of the consensus of

authority decided by the Mississippi Supreme Court on this subject is simply unwarranted. Historically speaking, Barr, was the culmination of a series of cases[3] decided by the United States Supreme Court arising from a number of civil rights demonstrations in the late 1950's and early 1960's and stood for the basic proposition that "state procedural requirements which are not strictly or regularly followed cannot deprive [the federal courts] of the right to review." 378 U.S. at 149, 12 L.Ed.2d at 769.

The question remains open as to the precise meaning of the phrase "strictly or regularly followed". To this end, there have been less than a plethora of decisions on point. For the most recent decision on this subject see:

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3 See: NAACP v. Alabama ex rel Flowers, 377 U.S. 288 (1964); Shuttlesworth v. City of Birmingham, 376 U.S. 339 (1964); Wright v. Georgia, 373 U.S. 284 (1963); NAACP v. Alabama ex rel Patterson, 357 U.S. 449 (1963).

James v. Kentucky, 466 U.S. 341, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984). We find some guidance in the case of Bouie v. City of Columbia, 379 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), a companion case to Barr. In summarizing the concept of the Barr "rule of consistence," this Court stated:

> The basic due process concept involved is the same as that which the court has often applied in holding that an unforeseeable and and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court' review of a federal question. See e.g., Wright v. Georgia, 373 U.S. 284, 10 L.Ed.2d 349, 354, 83 S.Ct. 1240 (1963); NAACP v. Alabama, 357 U.S. 449, 456-458, 2 2 L.Ed.2d 1488, 1496, 78 S.Ct. 1163 (1958); Barr v. City of Columbia, 378 U.S. 146, 12 L.Ed.2d 766, 84 S.Ct. 1734. The standards of state decisional consistency applicable in judging the adequacy of a state ground are also applicable, we think, in determining whether a state court's construction of a criminal statute was so unforeseeable as to deprive the defendant of the fair warning to which the Constitution entitled him. In both situations "a federal right turns upon the status

of state law as of a given moment in the past - or, exactly, the appearance to the individual of the status of state law as of that moment . . . ." 109 U.Pa.L.Rev., supra, at 74, n. 34. When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law "in its primary sense of an opportunity to be heard and to defend [his] substantive right." Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 678, 74 L.Ed. 1107, 1112, 50 S.Ct. 451. When a similarly unforeseeable state-court construction of a criminal statute is applied retroactively for past conduct, the effect is to deprive him of due process of law in the sense of fair warning in that his contemplated conduct constitutes a crime. Applicable to either situation is the Court's statement in Brinkerhoff- Farris, supra, that "if the result above stated were attained by an exercise of the State's legislative process, the transgression of the due process clause of the Fourteenth Amendment would be obvious," and "violation is nonetheless clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid . . . state statute." Id., at 679-680, 74 L.Ed. at 1112,1113.

378 U.S. at 354-55.

When viewed in the context of the historical application of the writ of error coram nobis after affirmance on direct appeal the conclusion reached by the court below is unsupportable. While clearly there may have been a deviation or two from the strict standard over the years this conduct could clearly be laid at the feet of the Federal Judiciary. See: Fay v. Noia, 372 U.S. 391, 9L.Ed.2d 837, 83 S.Ct. 822 (1963). Accord: Goldsby v. State, 226 Miss. 20, 86 So.2d 27 (1956); Goldsby v. Harpole, 249 F.2d 417 (5th Cir. 1957); Brown v. State, 173 Miss. 543, 158 So.2d 339 (1935), rev'd 297 U.S. 278, 56 461, 80 L.Ed. 2d 682 (1936).

The court below has previously held that minor deviations are simply insufficient to invalidate the procedural bars imposed by a state court. Taken to its logical

conclusion, the decision here is unthinkable, in that the State courts could never invoke its authority to remedy plain error or prevent manifest injustice without risking total federal intervention into all cases. This is so because the plain error rule is invoked to address questions not properly preserved or properly raised by a defendant. By excusing a procedural default to address plain error the State court then fails to "regularly or strictly" apply its procedural rules. Clearly under Sykes and United States v. Frady, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982), such could be argued as violation of due process as an unforseen change in the law. This decision means that the state courts must give rate adherence to the rules of procedure regardless of the violation's significance.

The Court of Appeals further ignored its own precedent in Henry v. Wainwright, 686 F.2d 315 (5th Cir. 1982). It will be remembered that the Fifth Circuit originally held in Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981), that because the Florida Supreme Court had excused procedural defaults in similar circumstances in other cases that the federal courts did not have to recognize the procedural bar Henry's case. This Court in Wainwright v. Henry, 457 U.S. 1114, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982), vacated the judgment of the Court of Appeals and remanded the case for further consideration in light of Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). On remand, the Court in reaching the merits of the claim stated:

> In the situation presented here, where the state court's opinions do not make it clear that a point is not passed upon due to failure to preserve it by timely objection, the state must be presumed to have applied its own rules to reach and reject the claim on the merits.[4]

---

[4] Otherwise, federal review would unjustly be denied a prisioner who has no way of

> proving that the state courts did consider the merits of his claim. This presumption does not unduly infringe upon the comity considerations underlying Sykes and Isaac, for all a state must do to preclude federal examination of an alleged error, contrary to state procedural rules, is to indicate that it has found the claim to be procedurally barred.
>
> The appellant asserts that we have circumvented Sykes and Isaac by finding that, in a completely unrelated case, Florida excused state procedural default. To the contrary, we do not mean to suggest that past excuse of a default on another case allows a federal court to excuse a default in a case where the state courts have not. Instead we have looked to florida law to determine what the state courts have done in the case before us. This is a necessary, accepted analysis in habeas cases. See, e.g., County Court v. Allen, 442 U.S. 140,149-51, 99 S.Ct. 2213, 2220-22, 60 L.Ed.2d 777 (1979).
>
> [Emphasis added] 686 F.2d at 314.

The Mississippi Supreme Court clearly imposed the procedural bar in this case refusing to excuse the procedural default. The Court of Appeals although presented with

arguments concerning the precedent in Henry, did not even mention it the present opinion or the Wheat opinion.

Even more suprising we find the the precedent established in Bass v. Estelle, 696 F.2d 1154, reh'g. denied, 705 F.2d 121 (5th Cir.1983), cert. denied, 464 U.S. 865, 104 S.Ct. 200, 78 L.Ed.2d 175 (1983), similarly ignored. A similar claim was made in Bass. The Court stated in footnote 4:

> 4. Bass also appears to contend that since on occasion the Texas court addresses the merits of claimswhich it might have viewed as waived, and that when it does so we consider ourselves authorized to do likewise, e.g., Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), aff'd en banc 626 f.2d 396 (1980), we must disregard the state's contemporaneous objection rule in all cases. We have recently rejected this contention. Speaking of our practice of reaching the merits where the state court has done so, rather than resting on procedural default, we explained:

Otherwise, federal review would unjustly be denied a prisioner who has not way of proving that the state courts did consider the merits of his claim. This presumption does not unduly infringe upon the comity considerations underlying Sykes and Isaac, for all a state must do to preclude federal examination of an alleged error, contrary to state procedural rules, is to indicate that it has found the claim to be procedurally barred.

The appellant asserts that we have circumvented Sykes and Isaac by finding that, in a completely unrelated case, Florida excused state procedural default. To the contrary, we do not mean to suggest that past excuse of a default on another case allows a federal court to excuse a default in a case where the state courts have not. Instead we have looked to florida law to determine what the state courts have done in the case before us. This is a necessary, accepted analysis in habeas cases. See, e.g., County Court v. Allen, 442 U.S. 140, 149-51, 99 S.Ct. 2213, 2220-22, 60 L.Ed.2d 777 (1979). Henry v. Wainwright, 686 F.2d 311, 314 n.4 (5th Cir. 1982).

[Emphasis added] 696 F.2d at 1157-58.

On petition for rehearing in Bass the Court of Appeals stated:

> As for the second contention, we do not regard an occasional act of grace by the Texas court in entertaining the merits of a claim that might have been viewed as waived by procedural default to constitute such a failure to strictly or regularly follow the state's contemporaneous objection rule as permits us to disregard that rule generally, or where the state court has not done so. The basis of this claim is Barr v. Columbia, 378 U.S. 146, 84 S.Ct. 1734, 12 L.E.2d 766 (1964), a civil rights case in which the Court refused to accept the generality of exceptions as an independent and adequate state ground barring constitutional review, where the Court was able to point to four separate decisions from the same state court, all handed down within weeks of that before it for review, deeming identical exceptions sufficient. Such selective constructions of identical language are a far cry from our case. Moreover, we do not regard as dicta the language quoted by us in our original opinion from Henry v. Wainwright, 686 F.2d 311, 314 n. 4 (1982); and since it is not we are bound by it. Instead, it is a holding, voiced in response to a party's

> contention, that we will not excuse a procedural default in a case where state courts have not done so. Until such constructional legerdemain as occurred in Barr is drawn before us, we see no occasion to re-examine that holding; and no such thing is apparent here.
>
> 705 F.2d at 122-23.

See: Booker v. Wainwright, 764 F.2d 1371, 1378-80 (11th Cir. 1985), cert denied, ___ U.S. ___, 106 S.Ct. 339, 88 L.Ed.2d 324 (1986)(Addressing regular enforcement of procedural bar of failure to raise question on direct appeal.)

The conclusion is inescapable that even where a procedural bar exists, it does not have to be applied in every instance conceivable in order to survive a challenge against its regular and systematic enforcement. In holding that it has to be applied in every instance that it could conceivably be applied the Court of Appeals has clearly

circumvented the proscription in Sykes and Isaac against the federal court's intrusion into such areas.

In reaching the flawed conclusion in Wheat, that Mississippi has never clearly announced nor had it regularly and systematically applied its procedural bar, the Court of Appeals relied on cases in a totally different procedural posture from that of respondent's case. In Mississippi prior to 1984, petitions for post-conviction relief fell into two categories; (1) petitions for writ of error coram nobis filed in the trial court when no appeal has been taken from the conviction or guilty plea and (2) applications for leave to file a petition for writ of error coram nobis in the lower court filed in the Mississippi Supreme Court in situations where the conviction and sentence have been affirmed on appeal. In re Broom's Petition, 168 So.2d 44, 48 (1964), sets forth the

distinction between these two types of post-conviction proceedings. Traditionally in cases where no appeal was taken the conviction and sentence are not accorded the same finality those affirmed on appeal are accorded. Therefore when a petition was filed in the lower court, where no appeal had been taken, the trial court could address the merits. This decision could then be appealed to the state supreme court and the Mississippi Supreme Court would address the merits of properly preserved questions raised as it would in any other direct appeal.

However, in the second category, if a conviction and sentence have been appealed and affirmed, it takes on a different mantel of finality. The only way that a post-conviction petition could be brought after affirmance on appeal was under the provisions of Miss. Code Ann., § 99-35-145 (1972) (Repealed April 17, 1984, by § 99-39-1 et seq., Miss. Code Ann. (Supp.

1984)). Section 99-35-145 provided that after affirmance on appeal an application for leave to file a petition for writ of error coram nobis in the lower court must be filed with the Mississippi Supreme Court. The Court would then consider the application and either deny it or grant leave to file in the lower court. The only questions the court traditionally considered on the merits in a application for leave to file in the lower court, were questions of ineffective assistance of counsel [793 F.2d at 625, n. 3], newly discovered evidence and the effect of intervening decisions of the United States Supreme Court on convictions, other issues were held to be barred. Respondent's case falls into this second category as he appealed his conviction and sentence and they were affirmed on appeal. From 1956 until the time of the decision in respondent's case, in 1984, there are only

twenty-eight (28) written opinions in cases in the same posture as respondent's case. These cases are: King v. Thigpen, 441 So.2d 1365 (Miss. 1983); Evans v. State, 441 So.2d 520 (Miss. 1983), cert den. ___U.S.___, 104 S.Ct. 3558, 82 L.Ed.2d 8601 (1984); Smith v. State, 434 So.2d 212 (Miss. 1983); Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983); Wheat v. Thigpen, 431 So.2d 486 (1983); Callahan v. State, 426 So.2d 801 (Miss. 1983); Culberson v. State, 412 So.2d 1184 (Miss. 1982); In re Jordan, 390 So.2d 584 (Miss. 1980); Bell v. Watkins, 381 So.2d 118 (Miss. 1980); Auman v. State, 285 So.2d 146 (Miss. 1973); Spears v. State, 278 So.2d 443 (Miss. 1973); Brown v. State, 275 So.2d 103 (Miss. 1973); Holloway v. State, 261 So.2d 799 (Miss. 1972); Murphree v. State, 222 So.2d 694 (Miss. 1969); Irving v. State, 194 So.2d 239 (Miss. 1967); Yates v. State, 189 So.2d 917 (1966); Thompson v. State, 188

So.2d 239 (Miss. 1966); Fondren v. State, 187 So.2d 327 (Miss. 1966); Riley v. State, 183 So.2d 819 (Miss. 1966); Riley v. State, 182 So.2d 397 (Miss. 1966); In re Woodruff's Petition, 179 So.2d 268 (Miss. 1965); In re Broom's Petition, 168 So.2d 44 (Miss. 1965); Harvey v. State, 168 So.2d 49 (Miss. 1964); Thornhill v. State, 149 So.2d 27 (Miss. 1963); Kennard v. State, 148 So.2d 660 (Miss. 1963); Rogers v. State, 130 So.2d 856 (Miss. 1961); Conn v. State, 123 So.2d 859 (Miss. 1960); Lang v. State, 92 So.2d 670 (1957).

The Court of Appeals, for the most part, ignored these cases and instead relied mainly on cases in the other category on which to premise its irregular inforcement decision. The state would submit the cases in the same procedural posture as respondent's are the cases that the Court must consider in determining whether or not

the procedural bar is clearly announced and regularly and systematically applied in light of Hathorn, Barr, Bass and Henry.

As the Court of Appeals admits, it did not do an exhaustive review of cases where the Mississippi Supreme Court has decided error coram nobis cases. This is the fatal flaw in the decision of the Court of Appeals decision. Feeling that some indepth consideration is necessary we proceed. As noted during the time period between 1956 and the 1984 date of respondent's application, the Mississippi Supreme Court decided, with written opinion, twenty-eight (28) cases in the same procedural posture as that of respondent's case, ie. an application for leave to file a petition for writ of error coram nobis in the lower courtfiled with the Mississippi Surpeme Court, as allowed by Section 99-35-145, Miss. Code Ann. (1972) (Repealed April 17, 1984, by Section 99-39-1, et seq.).

In the Wheat opinion, relied on in reversing this case, the Court of Appeals recognized that ineffective assistance of counsel claims are treated differently than other claims. 793 F.2d at 625, n. 3. Of the twenty-four (24) cases listed above six (6) cases contained questions of ineffective assistance of counsel, in some they were addressed on the merits and in others they were held to be barred. King; Smith; Wheat; Callahan; Culberson; Bell; Yates; Fondren; Thornhill; Rogers. These cases cannot form the basis of holding that Mississippi does not impose its procedural bar regularly and systematically, as the Mississippi Supreme Court does not impose a bar until a defendant has had at least one opportunity to have his claim of ineffectiveness addressed. Read v. State, 430 So.2d 832 (Miss. 1983).

Another type of claim comes in for special treatment as we mentioned above. This is a claim of newly discovered

evidence. The Mississippi Supreme Court created this procedure for raising claims of newly discovered evidence in Lang v. State, supra. This claim by its very nature must have its merits examined, first to see if the petitioner knew or should have known of this claimed new information at the time of trial. If he did then a bar will be imposed. Secondly if it was not known then the Court must look at the merits to determine if it falls into the purview of Lang. See: Kennard; Murphree.

Of the twenty-eight (28) applications written on by the Mississippi Supreme Court only four (4), arguably, have been addressed on the merits. In 1965, the Mississippi Supreme Court spoke to the merits in In re Woodruff's Petition, the reason the Court did so was that petitioner's counsel had perfected an appeal, but never filed a brief. The appeal was dismissed for lack of prosecution. The Court treated the dismissal as an affirmance and allowed an application for leave to proceed in the lower court to be filed. It is clear that

the case was addressed on the merits because counsel had failed in his duty to file briefs or assignment of errors. This was an ineffective assistance of counsel case and therefore not subject to a bar. Therefor no procedural bar was imposed.

The next case in which there was a failure to impose the procedural bar was Thompson v. State. The Court stated its reason for not imposing the bar as follows:

> Since there is some doubt[1] raised as to whether or not there is an effective waiver of a federal constitutional right by the failure to raise such right during the trial, we are of the opinion in the instant case that the petition for a right to file an application for a writ of error coram nobis should be allowed, and petitioner should be permitted to file a petition in the Circuit Court of Attala County, Mississippi.

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[1] Henry v. State of Mississippi, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965).

188 So.2d at 239.

Here it is clear that the confusion over the opinion in Henry v. Mississippi, 379 U.S. 433 (1965), caused this result in this 1966 decision. This confusion evidently lasted to some extent until the Court, when imposing the bar in Harley v. State, 264 So.2d 406 (Miss. 1972), held:

> In the case of Henry v. State, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965), the United States Supreme Court stated that:
>
> "The Mississippi rule requiring contemporaneous objection to the introduction of illegal evidence clearly does serve a legitimate state interest. . . . " 379 U.S. at 448, 85 S.Ct. at 567, 13 L.Ed.2d at 413.
>
> It is clear that objection to the action of the court in appointing persons as bailiffs who are later called as witnesses must be made at the time when the bailiffs are called as witnesses, or if known, at the time when they

they are appointed by the court.

. . .

> We hold that the trial court was correct in dismissing the petition for writ of error coram nobis in this case, because the alleged error was not brought to the attention of the trial court during the trial of the original case.

264 So.2d at 408.

Harley was an appeal from denial of error coram nobis relief in the lower court which puts it into the other category of error coram nobis cases, but the indication is clear that the Court had cleared the doubts in its mind relating to the Henry decision.

Bell v. Watkins, cited by the Court of Appeals as a decision on the merits, simply cannot be called a decision on the merits of every question raised in the application. The opinion in Bell is mainly a chronical of the course of proceedings the case had taken

up to the point of the petition under consideration. The only merits the Court actually spoke to were the claim of newly discovered evidence not available at the time of trial and the claim ineffective assistance of counsel. As noted above these matters are ones generally excepted from the procedural bar. The Mississippi court points out that it is considering only these claims and they are in fact not new claims, but ones presented on prior petitions. The Court stated:

> The petitioner alleges that facts and/or legal issues raised in his complaint in the nature of a petition for writ of error coram nbobis and/or a writ of habeas corpus came to the attention of petitioner after the decision of this Court rendered May 24, 1978. A copy of the complaint is attached hereto as Exhibit "C".
>
> The Court, sitting en banc, has carefully and meticulously considered each allegation of the petitioner's complaint in the nature of a petition for writ of error coram nobis and/or petition for writ of habeas corpus. Some of the allegations have now been considered by the Court in this case no less than four times.

> We have given particular attention to the petitioner's allegations with reference to his claim of inadequacy of counsel, and after a review of the record and trial transcript of this cause, are of the opinion this allegation is particularly lacking in merit for any of the reasons assigned by the petitioner. Trial counsel diligently and able represented the petitioner at every stage of the proceedings.
>
> We are of the opinion that the petitioner, Charles Sylvester Bell, received a fair trial by a jury of his peers in conformity with the laws of the State of Mississippi and the Constitution of the United States; and, the verdict of the jury. and sentence imposed upon his were amply supported and justified by the evidence beyond a reasonable doubt.
>
> 381 So.2d at 119.

The Court considered only the newly discovered evidence claim and the ineffective assistance of counsel claims on the merits. In any event the State did not raise the bar in the defense of this case. What we have in Bell, is a waiver of waiver situation. The State simply waived its

right to rely on the procedural bar in the case by not raising it before the Mississippi Supreme Court. See: Young v. Herring, 777 F.2d at 204; Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982); Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981). The blame for not imposing the bar against the claims can be laid at the feet of the State in this case not the Mississippi Supreme Court. The Mississippi Supreme Court has imposed the bar when the State relied on that theory to defend the case. This waiver of waiver doctrine was applied by the Court of Appeals in its decision in Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982).

Again in In re Jordan, supra, the State failed to raise the procedural bar as its defense to the claimsand the decision of the Mississippi Supreme Court is clearly on the merits. The waiver of waiver doctrine

applies here also, as the State did not assert the procedural bar before the Mississippi Supreme Court in the post-conviction proceeding. These are the cases that the Mississippi Supreme Court addressed on the merits.

The Court of Appeals cited Culberson v. State, 412 So.2d 1184 (Miss. 1982), as a decision on the merits. 793 F.2d at 625, n. 3. The Court is wrong. The Mississippi Supreme Court's opinion in Culberson does not address the merits. The opinion only states that there is one issue that requires an evidentiary hearing: an ineffective assistance of counsel claim. This fact is borne out by the opinion on appeal from the denial of relief by the trial court. When Culberson filed his petition in the trial court he raised every issue that had been presented to the Mississippi Supreme Court in his application there. The trial court refused to hear them because it found no jurisdiction to do so.

Culberson then raised the refusal to hear the claims on direct appeal from denial of the writ. The Mississippi Supreme Court in Culberson v. State, 456 So.2d 697 (Miss. 1984), held:

> We consider only this assignment of error [ineffective assistance of counsel] for the following reason: Under this Court's order granting permission to file the Petition for Writ of Error Coram Nobis, the court at that time fully considered all reasons for requesting the petition and found that only one question could or should be considered by the trial court under the petition. This was, as herein before stated and as stated in the first assignment of error now before us, that Culberson was allegedly refused permission to testify at his trial.
>
> All of the other assignments of error now presented in this appeal either previously have been disposed of by this Court or all are procedurally barred, except the question granted as to whether or not Culberson was refused permission to testify. A careful study of the opinions heretofore cited confirms these statements.
>
> [Emphasis added] 456 So.2d at 698.

Therefore it is clear that the procedural bar was imposed in Culberson.

The Court of Appeals also relied on Phillips v. State, 421 So.2d 476, 483 (Miss. 1982), as stating that "constitutional defects" will be considered, although not raised on direct appeal. Phillips is a direct appeal from the denial of a writ of error coram nobis in the trial court, putting it in the first category of error coram nobis cases. The language in Phillips is referring to the appellants constitutional claim that a prior Kentucky conviction, relied on to sentence him as an habitual offender, was obtained in violation of Boykin v. Alabama, 395 U.S. 238 (1969). The remedy he had available to him if the Kentucky conviction were voided at some future date was to apply to the Mississippi Supreme Court for leave to file a petition for writ of error coram nobis challenging

the jurisdiction of the court to impose the sentence. Lack of jurisdiction because of a defective indictment can be raised at any time in Mississippi. Echols v. State, 180 So.2d 630 (Miss. 1965). In order to be sentenced as an habitual offender in Mississsippi the indictment must set out two prior convictions. See: Miss. Code Ann. § 99-19-81 (Supp. 1977); Osborne v. State, 404 So.2d 545 (Miss. 1981). Phillips claim on error coram nobis would stand in the position of a newly discovered evidence case.

The section relied on by the Court of Appeals from In re Broom's Petition, 168 So.2d 44, 48 (Miss. 1964), to support its ruling refers to petitions for writ of error coram nobis filed in trial courts where no appeal was ever taken to the Mississippi Supreme Court. This is clearly pointed out in the next paragraph of the opinion, where the Mississippi Supreme Court states:

> In summary, excepting those cases to which coram nobis under section 1992.5 is applicable, a

> prisoner in custody of the state, claiming the right to be released or to a new trial upon the ground that his sentence was imposed in violation of the Constitution of the United States or the State of Mississippi, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack may move the court which imposed the sentence to vacate, set aside or correct the sentence and grant a new trial, or may file a petition of like nature for a writ of error coram nobis for similar relief.
>
> [Emphasis added] 168 So.2d at 48.

The Section 1992.5, referred to in the above quote was the earlier codification of § 99-35-145, Miss. Code Ann. (1972). Broom, set forth the distinction between error coram nobis in the trial court and error coram nobis in the Supreme Court after affirmance on appeal that we have been speaking of, yet the Court of Appeals has ignored the crucial part of the opinion. Appeals from denials of writs of error coram nobis in the trial court have always been

treated differently than those where there has been an appeal and affirmance by the Mississippi Supreme Court. The judgment in those cases that never have been appealed have never been accorded the finality that those having been appealed and affirmed have received. In deciding if the Mississippi Supreme Court has regularly applied the procedural bar in cases similarly situated with that of respondent's we must look to the twenty-eight cases dealing with applications to file petitions for writ of error coram nobis in the lower court filed in the Mississippi Supreme Court. The forty-five (45) other cases dealing with petitions for writs of error coram nobis filed in the trial court and then appealed to the Mississippi Supreme Court that also have written opinions have no application here.

The Court of Appeals cites us to Fondren v. State, 199 So.2d 625 (Miss. 1967), as a case in which the court reached the merits of a claim not assigned as error on direct appeal. A cursory reading of Fondren will clearly show that it is an appeal from denial of a writ of error coram nobis by a trial court. Further it is a case of ineffective assistance of counsel and therefore not one coming under the procedural bar rule. The Mississippi Court states in Fondren:

> The state concedes that there was no waiver of appellant's right to object, since the proof shows that he was not advised of his rights by prior counsel. It should be noted that this question should not arise in future cases provided the trial judge takes the precaution to ascertain at the time of defendant's arraignment whether the defendant is aware of his constitutional right to object to the composition of the grand jury that indicted him and the trial jury that is to try him.
>
> [Emphasis added] 199 So.2d at 626.

The state admitted that Fondren received ineffective assistance of counsel by failure to properly advise him of his rights to

object to the composition of the grand jury. Fondren, stands for nothing here as it is an ineffective assistance of counsel case.

One last area where the Mississippi Supreme Court will entertain the merits of a claim on application for leave to file a petition for writ of error coram nobis is where there has been an intervening decision by the United States Supreme Court that has retroactive application and could invalidate a conviction altogether. In Spears v. State, 278 So.2d 443 (Miss. 1973), the state court considered whether Spears' conviction for abortion should be set aside by the decision in Roe v. Wade, 410 U.S. 113 (1973). No relief was granted. See also: Smith, 434 So.2d at 215.

The benchmark cases in the procedural bar area in Mississippi are Holloway v. State, 261 So.2d 799 (Miss. 1972) and Auman v. State, 285 So.2d 146 (Miss. 1973). Both Holloway and Auman clearly announce the procedural rule that a claim capable of being on direct appeal must be raised then or it is forever waived. Holloway states:

> Obviously, since petitioner referred to himself in his own direct testimony given at his trial, he and his counsel knew of the "show up" or "line up." However, it was never brought to the attention of the trial court, and no question was raised at the trial level that the circumstances had been prejudicially suggestive. Nothing related to it formed any part of the evidence upon which the jury acted in convicting petitioner. There was nothing about it among the several grounds assigned in petitioner's motion for a new trial nor was it assigned or argued as error in petitioner's appeal to this Court. The trial record reflects that petitioner was fairly tried and convicted upon sufficient evidence of guilt.
>
> . . .
>
> Moreover, if there was prejudice resulting from the "show up" or "line up," the facts and circumstances were known to petitioner

> and petitioner's present objection should have been raised at trial. No such proposition was advanced or submitted to the advanced or submitted to the trial court, either as a pretrial matter or in the course of the trial. Nor was it assigned as a ground in petitioner's motion for a new trial. A defendant in a criminal trial may not deliberately hold back matters known to him at the time of his trial until after the affirmance of his conviction and then, for the first time, use them to begin the whole process all over again.
>
> [Emphasis added] 261 So.2d at 800.

In Auman, the Mississippi court, in addressing an issue that was not raised on direct appeal, held, "[a]lthough this issue was not assigned or briefed as error [on direct appeal], due diligence required it to be. 285 So.2d at 147.

One last matter must be addressed and this is the reliance of the Court of Appeals in the Wheat opinion on the decisions by

District Courts in Mississippi in this case [Pruett v. Thigpen, No. EC84-31-LS-D (N.D. Miss. Nov. 21, 1984)] and Edwards v. Thigpen, 595 F.Supp. 1271(S.D. Miss. 1984). The District Court based its decision in the case at bar on Edwards. Wheat is also based on the holding in Edwards. The holding in Edwards is the most flawed of all as it relies on cases that are direct appeals from the original conviction and sentence, not post-conviction cases, to conclude that Mississippi has no legitimate procedural bar. The District Court in Edwards came to the conclusion that the Mississippi Supreme Court applies heightened scrutiny to death penalty cases on direct appeal therefore it excuses all procedural defaults. All of the cases relied on in Edwards emanated from direct appeal and not from post-conviction applications. In Leatherwood v. State, 435 So.2d 645 (Miss. 1983), the Mississippi

Court elabortated upon its scrutiny in death penalty cases stating:

> In cases where we feel that the asserted error has merit and that it unduly prejudiced the appellant, we may raise it as an apparent error on the fact of the record of the Court's own motion. Irving v. State, 361 So.2d 1360, 1363 (Miss. 1978). However, we are not required to do so by court rule or under section 99-19-105 (Supp. 1982) as claimed by the appellant. In this case we are not so persuaded and do not so move. This is consistent with prior holdings where the jury verdict was allowed to stand and similar instructions were approved. Smith v. State, 419 So.2d 563 (Miss. 1982); Voyles v. State, 362 1236 (Miss. 1978); and Bell v. State, 360 So.2d 1206 (Miss. 1978).
>
> 435 So.2d at 650.

It is clear that the "plain error" standard used on direct appeal may not be applied by a Federal Court to post-conviction proceedings. See: United States v. Frady, 456 U.S. 152, 166-67, 102 S.Ct. 1584, 1593-94, 71 L.Ed.2d 816, 829-30 (1982).

The district court in Edwards did not cite, nor could it cite any cases decided by

the Mississippi Supreme court applying the "heightened scrutiny" test in any post-conviction proceeding. To the contrary it is clear from a review of the cases cited above it is beyond question that the Mississippi Supreme Court has consistently applied its conservative scope of review in deciding applications for leave to file coram nobis proceedings in the trial court in death penalty cases.

In holding that Mississippi does not have procedural bars that have to be recognized because it occasionally addresses the merits of a claim that could be waived the Court of Appeals has ignored its own precedent set forth in Henry v. Wainwright; Bass v. Estelle; Gray v. Lucas; and Young v. Herring. In holding that it can reach the merits of the claim in question the Court of Appeals has circumvented the holdings in Wainwright v. Sykes, and Engle v. Isaac. The Mississippi Supreme Court did not announce any new rule in its decision in

Edwards or this case and it had clearly applied the procedural bar in question with regularity prior to the time of respondents direct appeal, taking this case out of the realm of the application of Barr v. Columbia, 378 U.S. 146 (1964) or Hathorn v. Lovorn, 457 U.S. 255 (1982).

2. Certiorari should be granted where the Court of Appeals held that the Respondent's failure to challenge a juror peremptorily when it could did not cure the error in the trial court failing to excuse a juror for cause.

Since the Court of Appeals held that the decision in Wheat, allowed it and the District Court to reach the merits of respondent's claims, the State would address the merits of the claim on which the District Court granted, and the Fifth Circuit affirmed, the grant of the writ of

habeas corpus in this case. The District Court granted respondent's writ of habeas corpus because it concluded the "Ronald Smith was not an indifferent and impartial juror as contemplated by Irvin v. Dowd and its progeny." The rational of the District Court and the Court of Appeals is unsound because they failed to recognize one key fact, respondent affirmatively accepted juror Ronald George Smith. This was done by his refusal to renew his objection to Smith when requested and by stating that he accepted the juror when asked if he wanted to accept the juror or challenge him premptorily. It is true that respondent made a challenge for cause. Thetranscript records the colloquy as follows:

> BY MR. BINDER: All right. Now, a Defendant looks for someone who is impartial. In the case, as the Judge has told you, it is a, you might say, two-type trial. If the Defendant is found guilty, there's another hearing about whether to give him life or the death penalty. That's what all this

talk all afternoon has been about. Now, from what you've read in the newspaper about Mr. Pruett or what you've heard on the T.V., would you--any of you feel uncomfortable if the situation were reversed and you were sitting where he is sitting and he was sitting in judgement on you,if you will, knowing what you have read? Any facts there that might be recalled to your attention if this trial continues that might make you a little biased against him. I want you to search your hearts,--we're in and about serious business--and you tell me if there is something that you read about the facts of this case that will make you a little uncomfortable or a little biased against Mr. Pruett if you sat in judgement on him.

(ONE JUROR RAISED HIS HAND.)

BY MR. BINDER: You have a little bad feeling about it?

BY MR. RONALD GEORGE SMITH: Only just from what I read.

BY THE CLERK: Mr. Smith--

BY MR. BINDER: And did it have a--what you read, did it prejudice you a little against him?

BY MR. SMITH: Just to find out if it's the truth.

BY MR. BINDER: In other words, you're telling the Judge and myself that if we went to trial and you were selected juror on Mr. Pruett's case, the truth of it is that he'd have to put on a little evidence based upon what you've read to kinda prove his worth to you because you've been--you've heard some things against him, haven't you?

BY MR. SMITH: Right.

BY MR. BINDER: And you're just being as honest about it as you know, aren't you?

BY MR. SMITH: Yes sir.

BY MR. BINDER: You know you're under oath?

BY MR. SMITH: Yes, sir.

BY MR. BINDER: All right. And--I'd say that that's one for cause, if the Court please.

BY THE COURT: You may continue, Mr. Binder. I'll rule later on the objections.

[Emphasis added] Tr. 586-87.

The record clearly demonstrates that respondent understood this as he made no more challenges until the end of voir. This

in accord with the preferred practice in Mississippi, which is to wait until all voir dire questions are asked and then to make the challenges out of the presence of the jury. See: Gray v. State, 472 Miss. 409, 421, n. 1 (Miss. 1985). When voir dire was complete, just as the trial court was excusing the jury from the court room, the following colloquy took place between the Court and Mr. Binder. The transcript reads:

> (CONFERENCE AT BENCH BETWEEN COURT AND CONSEL OUT OF HEARING OF JURORS:)
>
> BY MR. BINDER: Your Honor, there's two that's got an opinion that said they would require evidence--
>
> BY THE COURT: I know. And I'll probably sustain your objection, but I'll do it outside of their presence.
>
> BY MR. BINDER: All right.
>
> Tr. 609-610.

When the jury was out of the room the trial court, as required by Mississippi law, had the State exercise its challenges to the prospective jurors. During the State's challenges the interesting twist in this case came about. The State challenged Juror Smith in the following colloquy:

> BY MR. PETERS: The State would challenge Ronald George Smith, Juror No. 1, based upon the fact that he said he would be prejudiced and the Defense would have to put on evidence in order to remove his prejudice from his mind.
>
> BY THE COURT: I didn't interpret his testimony in that regard. He later stated he would not. Go ahead.
>
> BY MR. PETERS: Your Honor, if he did say that, would it be the Court's opinion that he should be excused because I'm quite confident that he said that and I would be willing for the court reporter to--
>
> BY THE COURT: I listened--he was asked if he would be uncomfortable and then he stated that he had read it and it had influenced him, but then he stated that he would be able to set that aside. It will be denied.
>
> Tr. ___

The respondent sat by and said nothing when the above discussion occurred.

When the respondent was ask to state his challenges for cause he challenged Juror Luecke. This challenge was denied and the following colloquy took place:

> BY THE COURT: Denied. Any others for cause?
>
> BY MR. BINDER: No, sir.
>
> Tr. 619

Respondent did not renew his challenge to Juror Smith, nor did he bring to the trial court's attention that his memory was like that of the district attorney. It becomes clear that the respondent had changed his mind, for what ever reason, concerning juror Smith. Although respondent had made a challenge to the juror at the wrong time, the trial court had indicated that it would probably look favorably on the challenge if brought up at the proper time. Respondent chose not to renew his earlier challenge or

make any challenge when given the opportunity at the proper time. Thus the District Court and the Court of Appeals were incorrect when they held that the trial court erroneously refused to allow respondent's challenge for cause against juror Smith. Where is the error? The petitioner did not renew his challenge when he was asked to do so. Therefore was no proper challenge for cause by the respondent.

What compounds the error of the courts below is what occurred when the respondent was asked to exercise his peremptory challenges. The State, as required by law, exercised its peremptory challenges and the following took

place.

> BY MR. PETERS: We tender.
>
> BY THE COURT: Okay. I'll call them out one at a time. Tell me if you accept or challenge. Ron Smith.

BY MR. JORDAN: Accept.

BY THE COURT: That will be Juror No. 1.

[Emphasis added.] Tr. 624-25.

Not only did respondent fail to challenge Ronald Smith for cause he affirmatively accepted him to sit on the jury in this case. Again we ask where is the error?

Respondent persuaded the District Court and now the Court of Appeals to accept his claim that the trial court refused to grant his challenge for cause. That clearly is not the case as there was no challenge for cause at the proper time and there was an affirmative acceptance of Juror Smith by respondent. This fact is on the face of the record, that cannot be changed. Therefore this claim then falls, at the very least, into the exception carved out of the Wheat ruling in the rulings in Johnson v. Thigpen, 623 F.Supp. 1121 (S.D. Miss. 1985)

and Evans v. Thigpen, 631 F.2d 274 (5th Cir. 1986) and in the District Court opinion in this case [A-19], this exception has been approved by the Fifth Circuit in Johnson v. Thigpen, 806 F.2d 1243 (5th Cir., 1986). That exception is where no objection is made at trial or on direct appeal the matter is waived and thus procedurally barred from consideration by the federal courts. Further it has long been the rule in Mississippi, independent of the bar spoken of in Wheat and held not be apply here, that the failure to make a contemporaneous objection at the proper time bars that issue from review on direct appeal. See: Cannaday v. State, 455 So.2d 713 (Miss. 1984). Further, the fact that the State's challenge for cause was not granted cannot be used by the respondent or the courts in support of respondent's claim as the State has never challenged the ruling of the trial court.

Looking to the merits of the claim as an alternative ground we find some interesting language in the record that would justify the trial court's finding that Smith had later stated that he would not require evidence to be put on to "remove his prejudice from his mind." Tr. 592, 600, 607, 609. Although some of these questions were directed at the panel as a whole, Mr. Smith was present and did not indicate that he could not give respondent a fair trial. The test in Passman v. Blackburn, 652 F.2d 559 (5th Cir. 1981) and Murphy v. Florida, 421 U.S. 794 (1975), are met. Smith, by his answers or acquiescence to these subsequent questions demonstrated his ability to lay aside his opinions and therefore the opinion he stated would not form the basis for a challenge for cause.

No matter what the merits of the argument are, respondents would contend that there was no refusal of the challenge for cause as to Juror Smith. Respondent simply did not make his challenge at the proper time. The action of the trial court did not force the petitioner to use a peremptory challenge.. Juror Smith was the first juror seated and he was seated with the words "accept" coming from respondent. Respondent had twelve (12) peremptory challenges at that point in time, he chose not to use one on Juror Smith. He instead affirmatively accepted Juror Ronald George Smith. The District Court and the Court of appeals were in error in holding that respondent was denied a fundamentally fair trial because the trial court did not excuse this juror for cause. The record in this case clearly shows the trial court did not refuse to do so.

Certiorari should be granted as the Court of Appeals refused to impose a legitimate State procedural bar, that being that respondent failed to raise the question of the seating of Juror Ronald George Smith at the proper time.

CONCLUSION

For the above and foregoing reasons petitioners respectfully submit that the petition for certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, certify that I have this day caused to be mailed via United States Postal Service, first-class postage prepaid, true and correct copies of the above and foregoing **Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit** to the following:

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This the 5th day of February, 1987.

Marvin L. White, Jr.

MARVIN L. WHITE, JR.